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No. 96-504

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,
Petitioners,

v.

MARION S. BARRY, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case involves the District of Columbia General Public Assistance ("GPA") program, an entirely locally-funded program of monthly cash assistance for certain adults who cannot work due to disability or incapacity as defined by local statute. In early 1991, due to severe budgetary constraints facing the District of Columbia, the D.C. Council adopted a number of cost-reduction measures, including the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991, D.C. Law 9-27 (the "Act"). This legislation, among other things, eliminated the GPA program for "incapacitated"

persons, and adopted a new eligibility standard for GPA benefits. In addition, the legislation placed a durational limit on entitlement to benefits by providing that persons entitled to GPA benefits under the new statutory standard would receive benefits for a certification period of not more than twelve months and would not be entitled to continuation of benefits once this period ended, unless they reapplied for benefits and were determined to be eligible for them.

The petitioners challenge these substantive amendments to the GPA program alleging that they are unconstitutional on their face as violative of the procedural component of the Due Process Clause of the Fifth Amendment. The District of Columbia Court of Appeals rejected the challenge and reversed the trial court's ruling of unconstitutionality.

1. GPA Prior to July 1991.

Prior to July 1, 1991, the GPA program provided assistance to three categories of adults who do not have minor children in their care.[1] They were: (1) adults who were incapacitated and unable to work for at least thirty days (designated "GU"); and (2) adults who were disabled and unable to work for at least twelve months (designated "GS"). D.C. Code § 3-205.42 (1988 ed.).

In order to qualify under the GU program, an individual had to be over 18 years old, be financially needy, and meet the definition of "incapacity" contained in the statute. D.C. Code §§ 3-201.1, 3-205.1, 3-205.42 (1988 ed.). "Incapacity" was defined as "a physical or mental incapacity" that is "supported by competent medical testimony and . . . of such a

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[1] Adults with minor children qualify for Aid to Families with Dependent Children (AFDC).

debilitating nature as to reduce substantially or eliminate the ability of the applicant or recipient to care or support himself or herself and be expected to last a period of at least 30 days." D.C. Code § 3-205.42(1)(B) (1988 ed.). This incapacity test is substantially lower than the one for the federal Supplemental Security Income (SSI) program, and individuals eligible under it generally did not qualify for SSI or any federally established welfare program.

Payments under the GU program were limited by statute to a time-specific period of not more than six months (the "certification period"). D.C. Code § 3-205.53(b)(1988 ed.). Benefits could not be continued beyond the certification period for the same incapacity unless the recipient reapplied for benefits. *Id.* Sixty days before the end of the certification period, the District was required to provide recipients with notice that informed them that if they believed they remained entitled to public assistance, they should submit, within thirty days, a medical report, a social history and a request for continuation of benefits. D.C. Code § 3-205.53(c) (1988 ed.). If a request for continuation of benefits was submitted, benefits could not be terminated until a determination was made that the recipient was ineligible. *Id.* In addition, recipients were entitled to continue to receive benefits if the recipient requested a hearing to challenge the determination that he or she was ineligible for benefits. D.C. Code § 3-205.59 (1988 ed.).

The GS program covered persons who met the statutory definition of "disability" under D.C. Code § 3-205.42(2)(1988 ed.):

> [a]n individual shall be deemed to be disabled if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

> which can be expected to result in death and which has lasted or can be expected to last for a continuous period of not less than 12 months.

Id. A GS recipient was required to apply for benefits under the federal Supplemental Security Income benefits program ("SSI"). That is because this definition was similar to that in the SSI program and individuals who qualified under it were likely also to qualify for SSI.

Under the GS program, the Mayor was required to reconsider the public assistance grant at least once a year. D.C. Code § 3-205.52 (1988 ed.). If benefits were denied as a result of this reconsideration, and the recipient appealed this denial, he or she was entitled to a continuation of benefits pending a hearing. D.C. Code § 3-205.59 (1988 ed.). Under both programs, if a recipient's benefits were incorrectly terminated, the recipient could receive those benefits retroactively. D.C. Code § 3-208.1(a)(1988 ed.).

2. D.C. Law 9-27.

In the spring of 1991, the District of Columbia government faced severe financial and budgetary constraints as a result of the economic recession. Report of the Council Committee on Human Services on the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991 at 2 (Apr. 25, 1991)("Committee Report"). As a consequence, the budget proposal submitted by the Mayor and approved by the D.C. Council for fiscal years 1991 and 1992 contained a number of reductions in governmental spending. *Id.* at 2-3. As the Council explained, "funding simply does not exist to fund adequately each and every program which the District has provided funding for in the past," and thus, "agencies and programs must accept some funding reductions." *Id.* at 3.

The reductions in governmental spending resulted in the enactment of D.C. Law 9-27, which amended the Public Assistance Act of 1982, D.C. Code § 3-201 *et seq.*, in a number of ways, including the changes in the General Public Assistance program that are at issue in this action.[2] This legislation enacted three substantial changes in the GPA program.

First, D.C. Law 9-27 eliminated the GPA benefits for incapacitated persons, thereby terminating the GU program. The legislation provided that "beginning July 1, 1991, an individual shall be eligible for GPA benefits only if the individual" meets the disability standard established for the federal Supplemental Security Income (SSI) program. D.C. Code § 3-205.42a(a)(1994 ed.). The Committee Report accompanying the legislation explained that this step was necessary because the "stark reality of the situation is that the AFDC caseload is increasing and there is a dire need to maintain adequate funding for the growing AFDC caseload which is comprised of needy children." Committee Report at 5.

In order to soften the blow of the termination of the GU program, the new law permitted the payment of benefits to incapacitated persons under the GU program to continue until the expiration of the recipient's certification period. *See* D.C. Law 9-27, § 2(f), *codified at* D.C. Code § 3-205.42a(b)(1994 ed.). Once that certification period expired, however, the legislation provided that "[b]enefits . . . shall not be paid to an individual unless the GA recipient reapplies for benefits and is determined to have a disability" that meets the federal SSI standard. *Id.* Second, the legislation provided that "[n]o payments shall be made . . . for a period in excess of 12

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[2] D.C. Law 9-27 also reduced the level of public assistance benefits.

months . . . unless the grant is reviewed as a result of a reapplication by the applicant." D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53(b)(1994 ed.). The legislation retained the provision requiring the government to provide recipients with 60 days notice of the end of the certification period, and permitting recipients to continue to receive benefits past a certification period in the event that a determination had not been made on the reapplication for benefits. *Id.* However, the legislation made clear that recipients would not have a right to continued benefits past the certification period if the reapplication was rejected, stating:

> Benefits shall not be continued beyond the effective date of termination if the sole basis of the individual's appeal of the termination is the failure to meet the disability standard defined in D.C. Code § 3-205.42.

D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53 (1994 ed.).[3]

Third, the new legislation amended the statutory definition of "disabled" that the GPA program had previously used. Under D.C. law 9-27, an individual "shall be deemed to be disabled if the individual is determined . . . to be disabled based upon the criteria for the Supplemental Security Income program established pursuant to the Social Security Amendments Act of 1972." D.C. Law 9-27, § 2(e), *codified at* D.C. Code § 3-205.42 (1994 ed.).

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[3] The legislation did not amend that provision entitling a recipient to retroactive payments if the initial rejection of the reapplication was later determined to be erroneous. D.C. Code § 3-208.1 (1988 ed.).

As construed by the courts below, the principal function of the statute in establishing the new criteria under which welfare payments are made only to those who are unemployed due to medical disability is to provide assistance "while they are awaiting a decision from HHS as to their applications for federal disability benefits" under the SSI program. (A. 70a) "The local benefits serve as a stop-gap measure to assist such persons with survival funding while they seek more substantial financial help from the federal government." (*Id.*)

3. Implementation of the New Law.

The new law permitted public assistance recipients to continue to receive their grants under the old law until the expiration of their individual certification periods. As a result, the implementation of D.C. Law 9-27 was actually a phased-in process.

Beginning in the summer of 1991, GPA recipients' certification periods began to expire. At that time, the D.C. Department of Human Services (DHS) sent to the recipients notification that their certifications were coming to an end and informed them that they must complete the enclosed medical record and social history forms if they wished their benefits to continue. The completed medical record form and social history form were then submitted to the DHS medical review team for a determination as to whether they were eligible for benefits under D.C. Law 9-27. If the medical review team determined that the recipient was not disabled, the recipients' benefits were terminated at the end of their certification period.

Once the medical review team determined that a recipient was not disabled, DHS sent the recipient a notice stating that his or her benefits would be terminated "because based on the

medical information you provided you were not determined to be disabled." In addition, the notice informed the recipient, in capitalized letters, that "your benefits cannot be continued beyond the effective date of termination if the sole basis for the appeal is your failure to meet disability standards." However, the notice also contained, in small print, some form language, which stated in part: "If you make a timely request for a hearing your benefits will continue until a hearing decision was rendered."[4]

The Superior Court of the District of Columbia held that the new law was unconstitutional on its face, under the Due Process Clause of the Fifth Amendment, for failure to provide a hearing prior to termination of benefits, despite expiration of the recipients' certification periods.

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[4] In addition, in November 1991, a notice was sent to each public assistance recipient that stated:

> Dear Recipient,
>
> Recently enacted D.C. Law 9-27, at Section 542, eliminates incapacity as a basis for general public assistance (GPA) benefits. Only those persons who are medically determined by the Mayor to be disabled, based upon the criteria for the supplemental social security program established pursuant to the Social Security Amendments Act of 1972, will be eligible for benefits. Those of you who have received benefits based upon incapacity will continue to receive benefits until the expiration of your certification period. At that time, it will be necessary for you to submit a new medical evaluation which will be used to determine your eligibility for general public assistance benefits.

4. The Decision of the D.C. Court of Appeals.

The Court of Appeals held that GPA recipients have a property in the continued receipt of their welfare benefits only for the duration of their certification period. The Court stated that recipients "possessed no 'property interest' in the continued receipt of GPA benefits extending beyond the expiration of the current certification period following the enactment of D.C. Law 9-27." (A. 4a) When their certification periods expired, the Court stated, "these hold-over recipients had no 'right' to continued benefits and stood under the statute in virtually the same posture as first-time applicants." (A. 15a)

REASONS FOR DENYING THE WRIT

At the outset, it should be recognized that the formal statement of the question presented in the petition does not deal with the principal rationale of the Court of Appeals in upholding the constitutionality of the legislation involved in this case. In the view of the Court of Appeals, this case concerns the power of the D.C. Council to define the nature and duration of recipients' entitlement to welfare benefits. More specifically, to that Court, the case presents the question of whether the procedural component of the Due Process Clause of the Fifth Amendment places a substantive limitation on the authority of the D.C. Council to place a durational, one-year limit on welfare entitlement in the GPA program, where the durational limit is closely related to the purpose of the program. We question whether the Court may appropriately issue a writ of certiorari in this case, where the petitioning parties ignore the principal rationale of the Court of Appeals in stating their question presented.

Here, the purpose of the program is to provide transitional GPA benefits while recipients seek SSI benefits. Certainly, a

one-year period is a sufficient period for federal officials to process these applications. Decisions of this Court make it clear that legislatures have plenary authority to define entitlements to public benefits in this manner. This case does not present a significant question for the Court's consideration.

I. DECISIONS OF THIS COURT PERMIT THE D.C. COUNCIL TO PLACE SUBSTANTIVE, DURATIONAL LIMITS ON WELFARE ENTITLEMENTS.

The principal rationale of the Court of Appeals in holding that the petitioners were not entitled to a hearing prior to termination of their benefits was that petitioners had no entitlement or property interest in continued receipt of payments beyond the expiration of their current certification period. That is because the D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53(b)(1993 Supp.), placed a durational limit on welfare entitlement in the GPA program. (A. 4a, 15a) As a result of this section, neither those persons who established their eligibility for benefits under D.C. Law 9-27 nor those persons who had been receiving benefits under the pre-amendment incapacity standard were eligible for benefits past the expiration of their certification periods unless they reapplied for benefits and were determined to be eligible for them. The petitioners argue that the certification periods established by District law are procedural in nature and therefore cannot limit the rights of GPA recipients to continue to receive need-based benefits pending an evidentiary hearing under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

It is well-established, however, that the extent of any property interest in a state welfare program is defined by that state law. As the Court explained in the seminal case of *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (em-

phasis added),

> Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. . . .
>
> Just as the welfare recipients' "property" interests in welfare payments *was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment.*

See also, *Bishop v. Wood*, 426 U.S. 341, 344 (1976)("the sufficiency of the claim of entitlement must be decided in reference to state law").

The petitioners seek to distinguish *Roth* from the District's assistance program on the ground that the contract at issue in *Roth* contained no provisions for renewal. The petitioners argue that because GPA recipients may receive benefits for additional certification periods, the time limitation is a "procedural" mechanism in this case rather than a substantive limitation as the Supreme Court found in *Roth*. And because the time limit is "procedural," the petitioners contend that Section 2(h), which precludes GPA recipients from receiving benefits past the certification period even if they are appealing a denial of their reapplication, is unconstitutional under *Cleveland Bd.*

of Educ. v. Loudermill, 470 U.S. 532 (1985).

Loudermill does not so limit the power of the legislatures. In *Loudermill*, the Court held that the question of "what process is due" is answered by the federal Constitution, not by state law. 470 U.S. at 541. But, in so ruling, the Court did not diverge from the principle that the dimensions of any asserted property interest is determined by state law, not by the Constitution. The Court began its decision by recognizing the rule established in *Roth* that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" 470 U.S. at 538 (quoting *Roth*, 408 U.S. at 538). It was only after examining the state law and ascertaining that the law provided the claimant with a property interest that the Court turned to its rejection of the "bitter with the sweet" approach in answering the question of what process is due.

The petitioners' argument, if accepted, would leave legislatures in the position of choosing between the unlimited time-period needs program that was involved in *Goldberg* and a program that eliminates the ability of recipients, regardless of need, to receive benefits beyond a time-specific period. There is no justification for so limiting the power of the legislature. Although *Loudermill* rejected the "bitter with the sweet" approach to the question of what process was due, neither that decision nor any other one has restricted legislatures' power to define temporally the reach of a benefits program. Indeed, in a decision issued the same term as *Loudermill*, the Court explicitly recognized that the legislature retains the "plenary power to define the scope and duration of the entitlement." *Atkins v. Parker*, 472 U.S. 115, 129 (1985).

Thus, contrary to the petitioners' claim, states may constitutionally chose (as Congress has done with the federal food stamp program),[5] to establish a need-based assistance program that limits any property interest to discrete time periods, but permits recipients to obtain benefits on an uninterrupted basis if they requalify for those benefits for another time period.

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[5] The entitlement structure of the GPA program is not new. The GPA program, including the refusal to provide benefits beyond the certification period of eligibility for recipients who have reapplied for benefits and are challenging a denial of that reapplication, is the same in structure in essential respects as that established by Congress for the federal Food Stamp Program in 1977, nearly twenty years ago. *See Banks v. Block*, 700 F.2d 292, 294-95 (6th Cir. 1983)(describing the structure of the Food Stamp Act), *cert. denied*, 464 U.S. 934 (1983). Under the Food Stamp Program, recipients are given specific certification periods for eligibility to food stamp benefits; are required to reapply for benefits past the certification period; do not receive a hearing before an initial determination is made on the reapplication; and are precluded from receiving benefits past the expiration of the certification period even if the beneficiary is appealing a denial of the reapplication. *See Banks*, 700 F.2d at 294-95.

In judicial challenges to the congressional enactment, both the Fourth Circuit and the Sixth Circuit have concluded that termination of food stamp benefits without a hearing when a certification period ends does not violate the Due Process Clause, because there is no property interest in the continuing receipt of benefits beyond the certification period. *See Banks*, 700 F.2d at 298; *Jackson v. Jackson*, 857 F.2d 951 (4th Cir. 1987); *Holman v. Block*, 823 F.2d 56 (4th Cir. 1987).

II. PETITIONERS' CONCESSION BEFORE THE COURT OF APPEALS LIMITS THEIR ABILITY TO CHALLENGE THE PRINCIPAL RATIONALE OF THAT COURT IN RULING THAT PETITIONERS DO NOT HAVE A PROPERTY INTEREST THAT REQUIRES A PRIOR HEARING.

This case involves whether the Council of the District of Columbia may establish for the District a GPA program with distinct and separate entitlements or property interests, termed "certification periods," which limit a welfare recipient's participation in the program. As noted by the Court of Appeals, "[p]laintiffs' counsel, at oral argument, candidly acknowledged that the Council *could* have limited a recipient's entitlement to GPA benefits to a concrete, finite span of time, such as a year or a 'certification period.'" (A. 9a-10a, emphasis, the Court's) It seems to us that this concession limits the question of whether the Council did, in fact, create a durational limit on entitlement to one of statutory construction of local law.[6] The question of whether the Council did what the petitioners conceded it had the power to do turns on an interpretation of the statute and is not a question requiring this Court's further review.

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[6] The Court of Appeals found it "readily apparent" from the statute that the Council imposed "a substantive temporal limitation upon the GPA entitlement for those persons receiving benefits." (A. 11a)

III. THE LIMITATION ON GPA WELFARE ENTITLEMENT DOES NOT WARRANT REVIEW.

The petitioners argue that this case has special importance warranting review by this Court in light of the recent welfare reform legislation enacted by Congress, which will repeal the Aid to Families with Dependent Children (AFDC) program and replace it with a system of Block Grants to the States and the District of Columbia, to be used by them to finance assistance programs they choose to enact. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 103, 110 Stat. 2105 (1996) ("the Welfare Reform Act"). Petitioners suggest that a decision in this case will provide guidance to the States and federal officials in establishing the new state assistance programs contemplated by the Welfare Reform Act.

In the Welfare Reform Act, Congress reversed the more than fifty-year-old AFDC policy of providing a federal entitlement to welfare; the Welfare Reform Act does not provide recipients with any entitlement to payments. *Id.*, at § 103, amending § 401 of the Social Security Act, to be codified at 42 U.S.C. § 601(b) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."). The Reform Act also requires (with limited exceptions) the States and the District to impose a five-year, lifetime limit on the receipt of assistance payments to any recipient in programs funded by federal block grants. *Id.*, §103, amending § 408 of the Social Security Act, to be codified at 42 U.S.C. § 608(a)(7). As can be seen, the changes effected by the D.C. Council in the GPA program were rather modest, by comparison.

Petitioners, in effect, ask the Court to use this case as a vehicle to impose on federal welfare officials and the States additional constitutional limitations on their authority in implementing these reforms. (Pet. at 24-26) In our view, the new reform legislation counsels the opposite approach. The Court should await action by the States and federal government in implementing the new legislation before it considers additional constitutional limits.

IV. THERE IS NO DIRECT CONFLICT BETWEEN THE DECISION BELOW AND OTHER APPELLATE DECISIONS.

The petitioners allege the existence of a direct conflict between the decision of the Court of Appeals and many decisions of the United States Courts of Appeals and of the highest state courts. There is no such conflict.

The only decisions cited by petitioners involving statutory schemes with a similar entitlement structure are those that deal with the federal Food Stamp program. *See*, *Banks v. Block*, *supra; Jackson v. Jackson*, *supra;* and *Holman v. Block*, *supra.* The GPA program, including the refusal to provide benefits beyond the certification period of eligibility for recipients who have reapplied for benefits and are challenging a denial of that reapplication, is the same in structure in essential respects as that established by Congress for the federal Food Stamp Program in 1977; and upheld by the courts in those decisions.

Because the property interest in continued receipt of food stamps ended at the end of the certification period, the courts in *Banks* and *Holman* rejected the recipients' claim that *Goldberg v. Kelly*, 397 U.S. 254 (1970), required that they receive pretermination hearings. As the courts explained, the

ruling in *Goldberg v. Kelly* was based on the fact that "recipients were entitled to benefits, on a continuous basis, as long as they remained eligible." *Banks*, 700 F.2d at 297; *Holman*, 823 F.2d at 59. Thus, the courts concluded that *Goldberg v. Kelly* does not require that benefits be continued pending a hearing when the statutory entitlement to those benefits has ceased.

The Court of Appeals reached the same result here. Unlike the welfare statute at issue in *Goldberg v. Kelly*, D.C. Law 9-27 entitles recipients to benefits for a maximum of twelve months. After the certification period expires, the GPA recipient must reestablish his or her entitlement to benefits. Indeed, the GPA recipient stands under the statute in virtually the same posture as a first-time applicant. And applicants to a benefits program have no constitutional right to receive benefits while their claim is being processed. *See Lavine v. Milne*, 424 U.S. 577, 586 (1976)("nothing in the Constitution requires that [public assistance] benefits be initiated prior to the determination of an applicant's qualifications at an adjudicatory hearing."). In short, as the Court of Appeals held, GPA recipients have a property interest in the continued receipt of their benefits only for the duration of their certification period.

None of the allegedly conflicting decisions has an entitlement structure similar to that in the GPA or in the food stamp programs. For example, petitioners rely heavily on *Youakim v. McDonald*, 71 F.3d 1274 (7th Cir. 1995) and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), which are distinguishable from this case on the ground that the programs involved in those cases had open-ended entitlements, as opposed to programs where legislatures have placed durational limits on entitlements like those in the GPA or Food Stamp programs. Those cases deal with the issue of the procedures, if any,

required by the Due Process Clause when the application of a new law, that affects existing, open-ended entitlements, requires individual factual determinations to determine the precise impact on individual cases.

Similar issues would arise in the GPA (or Food Stamp) program only if the government were to apply a new law with more restrictive eligibility requirements *prior* to the expiration of the certification period. Before expiration of the period, the recipient has a property interest that is affected by application of the new law. By contrast, application of a new eligibility requirement *after* the certification period ends, while the applicant is attempting to qualify for a new certification period, does not affect a property right or interest.

In this case, and in the Food Stamp cases, the recipients claimed to be eligible following the expiration of the durational limit on their entitlements. No property interest is affected in such a scheme by enactment of a new law that conditions eligibility for the next certification period on proof of compliance with new criteria.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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